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NO. 87-1424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA, ex rel.
STATE BOARD OF ELECTIONS,

Petitioner,

V.

WILLIE B. KILGORE, DORIS McCONNELL, PATSY BURCHETT, KATHERINE JONES McCLELLAND, FAYE OWENS, ROGER ADAMS, EVELYN BACON, PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA, the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC INSURANCE COMPANY, and the COMPASS INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONSE OF KILGORE, McCONNELL AND BURCHETT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED BY THE COMMONWEALTH OF VIRGINIA

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RESPONDENTS

RESPONSE OF KILGORE, McCONNELL AND BURCHETT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS FILED BY THE COMMONWEALTH OF VIRGINIA

Willie B. Kilgore, Doris McConnell and Patsy Burchett respectfully respond to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit as set forth hereinafter.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit denied the plaintiffs'/appellees' Petition for Rehearing and Suggestion for Rehearing En Banc on November 19, 1987. Respondents Kilgore, McConnell and Burchett received the Petition for a Writ of Certiorari filed by the Commonwealth of Virginia on February 18, 1988.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provisions and statutes reproduced as Appendix D at A-70 in the Petition for a Writ of Certiorari, the following statutes are set forth verbatim in Respondents' Kilgore, McConnell and Burchett Appendix, "R.A.K.", at A-1: Va. Code §§ 24.1-18 and 24.1-107.

STATEMENT OF CASE

On March 1, 1983, Republicans Willie Kilgore and Doris McConnell served as General Registrar of Voters in Scott County and Lee County, Virginia, respectively. Pasty Burchett served as Assistant General Registrar in Lee County. McConnell had ten years experience as general registrar while Kilgore had four years experience.

Local county electoral boards appoint the general registrar and in turn, the general registrar appoints the assistant registrar. Va. Code §§ 24.1-43 and 24.1-45.

When the Democrats gained control of the governorship in 1982, composition of the local boards was set to change from a Republican majority to a Democratic majority. In March of 1983, Kilgore and McConnell also were scheduled for reappointment.

The Republican board's term expired "on" March 1, 1983 and Virginia law required the

appointment of a general registrar during the first week of March. Both Republican Boards met on March 1, 1983, and reappointed Kilgore and McConnell. Later, the Democratic boards convened meetings and appointed Democrats to serve as general registrars. Because of this sequence of events, the Virginia General Assembly altered the statute to end an "outgoing" board's term on midnight, the last day of February.

The Democratic board members did not consider Kilgore and McConnell even though the boards knew Kilgore and McConnell wanted to retain their positions. In Kilgore's case, the Democratic members had not heard complaints on Kilgore's job performance.

Burchett worked as Lee County Assistant Registrar for more than four years. At the time the Democratically controlled Lee County Electoral Board failed to rehire McConnell, Virginia law did not require the term of the assistant registrar to coincide with the general registrar's term. When the Democrat

assumed the general registrar's office in Lee County, he advised Burchett that he did not consider her to be his employee. The Democratic registrar then hired the former chairman of the Lee County Democratic Party to serve as an unpaid assistant registrar. In a few months, the Democratic registrar hired a paid assistant whose husband served as a Democratic precinct worker.

After the wholesale firings, Kilgore, McConnell and Burchett filed suits under 42 U.S.C. § 1983 alleging the local electoral boards and the Lee County Registrar infringed on their first amendment rights of free speech and association. Jurisdiction was based on 28 U.S.C. § 1331.

Prior to the Democratic appointees assuming office, Kilgore and McConnell sought preliminary injunctions to restore them to office pending a trial on the merits. The district court denied the motion but certified the denial for an immediate interlocutory appeal pursuant to 28 U.S.C.

§ 1292 (b). On April 1, 1983, the Fourth Circuit Judge Emory Widener heard this appeal and affirmed the district court denial. Judge Widener ruled that Kilgore and McConnell would receive their lost salary and benefits if they prevailed. The Commonwealth of Virginia opposed the injunction and did not object to this order. See Cross-Petitioners' Appendix, "C.P.A." at A-1. Relying on this precedent, Burchett did not seek a preliminary injunction to remain assistant registrar pending a trial on the merits.

All three cases went to a jury during the summer of 1985. All three juries found that the defendants refused to reappoint the plaintiffs "solely because of [their] political affiliation." The juries awarded Kilgore and McConnell approximately $75,000 each and Burchett $40,000.

In the Kilgore trial, all past and current electoral board members and State Board of Elections Secretary Susan Fitz-Hugh agreed that a democrat could do no better job

than a republican as general registrar. In McConnell's trial, the Democratic members attempted to show other reasons for McConnell's removal. In its special verdict, the jury rejected these arguments. The Lee County board members also affirmed that a democrat could do no better job than a republican as general registrar. Similarly, in Burchett's case, the Democratic registrar testifed unequivocally that political party affiliation was unnecessary for the effective performance of the assistant registrar.

Coupled with the political "firings" were issues of the defendants' qualifed immunity, the Commonwealth's eleventh amendment assertion and the state or local employment status of county electoral boards and registrars.

In memorandum opinions, District Court Judge Jackson Kiser affirmed the juries' awards and findings. See Kilgore v. McClelland, 637 F. Supp. 1241 (W.D. Va. 1985); Burchett v. Cheek, 637 F. Supp. 1249

(W.D. Va. 1985). In reaching his decision, Judge Kiser relied on this Court's ruling in Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 57 (1980). Judge Kiser recognized that the individual defendants did not enjoy qualified immunity because they failed to recognize this Court's rulings in Elrod and Branti. Kilgore, 637 F. Supp. at 1247. On the qualified immunity issue, the defendants presented no evidence in the district court to support a claim that they made the Branti "inquiry".

In a subsequent memorandum opinion, Judge Kiser recognized that the county electoral board members were "state" rather than "local" employees. Kilgore v. McClelland, 637 F. Supp. 1253, 1258 (W.D. Va. 1986). Prior to his decision, Kilgore and McConnell argued that electoral board members were state and local employees. Among other things, the State Board of Elections coordinates electoral boards and the

registrar, but the locality provides office space and furnishes office supplies and equipment. However, the locality fixes and pays the salary of the assistant registrar. See Va. Code §§ 24.1-45 and 24.1-45.1.

Judge Kiser recognized that the eleventh amendment usually bars monetary damages against the Commonwealth. Because the Commonwealth had purchased insurance for its employees, Judge Kiser ruled that the plaintiffs could recover from the Commonwealth's insurance carrier.

From these memorandum opinions, an appeal to the Fourth Circuit Court of Appeals followed. The Fourth Circuit affirmed the district court's ruling on the political discharges and followed the Court's Elrod/Branti reasoning. McConnell v. Adams, 829 F.2d 1319, 1324 (4th Cir. 1987). Even though this Court decided Branti three years prior to the wholesale dismissals in these cases, the Fourth Circuit reversed the district court and allowed the individual

defendants qualified immunity. The Fourth Circuit affirmed the "state" employee status of electoral boards and registrars. The circuit court then ignored the insurance coverage provided by the Commonwealth and held the eleventh amendment barred any recovery against the defendants in their official capacity.

Kilgore, McConnell and Burchett sought reconsideration of the damages issue in the circuit court. A panel of the circuit court denied their petition for rehearing on November 19, 1987.

RESPONSE IN OPPOSITION

I.

THE FOURTH CIRCUIT CORRECTLY HELD THAT ELROD AND BRANTI PROTECT THE JOBS OF GENERAL REGISTRAR AND ASSISTANT REGISTRAR BECAUSE THE EMPLOYERS FAILED TO PROVE THAT POLITICAL AFFILIATION WAS AN ESSENTIAL REQUIREMENT FOR THE JOB.

The defendants fail to show that political affiliation is a necessary job requirement for a registrar and an assistant registrar and do not demonstrate any conflict among the circuits on this point. This failure dictates that this Court should deny the Petition for a Writ of Certiorari on this issue and uphold the decision of the Fourth Circuit.

Persons occupying the positions of general registrar and assistant registrar fall within the protection of the first amendment. In 1976, the Court decided the landmark case of Elrod v. Burns, 427 U.S. at 347, which forbid the discharge of a non-policymaking, non-confidential government employee solely on the grounds of his

political beliefs. In 1980, this Court decided Branti, 445 U.S. at 507 and refined the standards governing a government employer's right to dismiss employees for political beliefs or affiliations. The Court stated, "the ultimate inquiry ... is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved...." Id. at 518. "It is through this narrow window that the defendants seek to escape liability in this case." Kilgore, 637 F. Supp. at 1244.

The cases at hand fall squarely within the confines of Branti. In the Kilgore and McConnell trials, "[v]irtually all of the witnesses who testified on the matter, including Susan Fitz-Hugh, Secretary of the State Board of Elections, responded in the negative when asked whether affiliation with a particular party was required in order that a general registrar effectively perform his or her duties." Id. Those witnesses

included the defendants themselves. Likewise, in the Burchett case, "[t]estimony at trial, including that of Defendant Cheek, was uncontradicted that political party affiliation of an assistant registrar is irrelevant to effective job performance." Burchett, 637 F. Supp. at 1251.

Of particular interest is the testimony of Susan Fitz-Hugh, Secretary of the State Board of Elections, the agency on whose behalf the Commonwealth was admitted as a party to this case. In answering a question from the district court judge, Fitz-Hugh testified that party affiliation would neither enhance nor detract from her ability to do the job even if the registrar was opposite to the party controlling the electoral board. This testimony from the chief election official in the Commonwealth of Virginia defeats any claim that a registrar must possess a particular political affiliation.

Despite this testimony, the Commonwealth now contends that the positions of registrar and assistant registrar require the same political affiliation as the majority of the electoral board on the theory that political difference could thwart the proper functioning of these offices. This argument is untenable in the face of established law. "Flatly rejected in Branti was any general notion that mutual trust and confidence could only exist between members of the same political party in any agency of the small size there involved." Jones v. Dodson, 727 F.2d 1329, 1338 (4th Cir. 1984). See Branti, 445 U.S. at 520, n. 14.

Although the Commonwealth contends that there was evidence of "political antipathy and animosity" in these cases, the jury in each of the three trials found that the defendants failed to reappoint the plaintiff solely because of the plaintiff's political affiliation, not because of any animosity. Furthermore, the proper focus is on the

office or position rather than the individual office-holder. See Meeks v. Grimes, 779 F.2d 417, 419 (7th Cir. 1985).

An examination of the duties imposed on general registrars and assistant registrars confirms that proper party affiliation is unnecessary for the performance of the job. A registrar's job is ministerial, McConnell, 829 F.2d at 1324, in that a registrar merely follows state and local guidelines and cannot deviate from these procedures. According to Secretary Fitz-Hugh, the primary responsibility of a registrar and an assistant registrar is registering voters in a fair and honest manner without regard to political affiliation. For example, a registrar must allow everyone to complete a registration card. If a registrar declines to register someone, the person can immediately appeal to the circuit court without paying court costs. Among the eighteen duties of the general registrar specified in Va. Code § 24.1-46, one is

prohibiting the solicitation of applications for registration, a provision designed to guard against partisanship. These duties coincide with the testimony of Secretary Fitz-Hugh that party affiliation is unnecessary for the jobs of registrar and assistant registrar.

The Commonwealth suggests that by providing for a majority of electoral board members to be drawn from the party of the governor, the General Assembly also intends for the registrar to be of that same party. This argument lacks merit. First amendment protection extends to all jobs that substantively meet the standard enunciated in Branti. This protection cannot be destroyed by legislative desire to place a particular position under the spoils system. Furthermore, contrary to the Commonwealth's suggestion, a review of Virginia election law shows that the General Assembly has attempted to make the system function in a balanced, non-partisan manner. In parts of the system,

non-partisanship is promoted by bi-partisanship, e.g. by requiring representation from both major parties among precinct election officials (Va. Code § 24.-107), in the appointment of three member local electoral boards (Va. Code § 24.1-29), and in the three member State Board of Elections (Va. Code § 24.1-18). But, unlike these examples, the General Assembly has said nothing about party affiliation as a requirement for the position of general registrar and assistant registrar. Clearly, the intention has been to promote non-partisanship through the electoral system by deliberately balancing party representation in those offices where more than one person is to serve, and by leaving the office of general registrar, which is occupied by a single individual, to be filled without regard to party affiliation.

Notwithstanding the non-partisan purpose of Virginia's election laws, the Commonwealth had an opportunity in the district court to

present evidence in support of their "grand statewide scheme" of legislative political spoils. It failed to do so. Kilgore, 637 F. Supp. at 1244. The Commonwealth has admitted that this scheme for the political hiring of general registrars and assistant registrars really pertains to just a few counties located in mountainous Southwest Virginia (a part of the Ninth Congressional District). Secretary Fitz-Hugh testified, for example, that she did not even know the political affiliation of most of the registrars in the state and that political affiliation is considered only in the "Fightin' Ninth" (Ninth Congressional District). The Commonwealth's argument condones politically-motivated firings merely because of the long history of partisanship in the "Fightin' Ninth District". Such a contention fosters varying standards of constitutional rights in different parts of the country. This is wrong. Regardless of locality and history, basic constitutional rights should

be guaranteed to everyone.

The Fourth Circuit properly applied the Branti standard to the jobs of registrar and assistant registrar. Political affiliation is not an appropriate requirement for the positions of general registrar and assistant registrar. While the Commonwealth claims inconsistency of the circuits, each of the cases cited by the Commonwealth involves an entirely different type of position than the voting registrar positions involved here.

Although the Commonwealth relies chiefly on Meeks, 779 F.2d at 417, this case did not involve a decision by the Seventh Circuit to uphold a political firing. On the contrary, the court reversed the trial court's ruling that the position of bailiff is excluded from the protection of Branti; and remanded the case for the taking of additional evidence. In so doing, the Seventh Circuit noted that political animosity might, in certain intimate settings, furnish the basis for an exception to Branti, but it stressed that any

such exception would only apply to "employees who work in direct and constant contact with a political official-employer." Meeks, 779 F.2d at 423. The only examples given by the court as qualifying for an exception were "the judge's secretary, the law clerks and, possibly, a court reporter or bailiff assigned exclusively to the judge." Id. These positions are quite different from that of a general or assistant registrar, whose duties are primarily registering voters and keeping records and whose daily routine does not bring them in "direct and constant contact" with any "political official," who is their employer. Id.

Similarly, the case of Soderbeck v. Burnett County, Wis., 752 F.2d 285, 288 (7th Cir. 1985), involved an employee who allegedly occupied the post of "confidential secretary." Confidentiality has been recognized as one of the factors that would tend to make partisan affiliation an appropriate job qualification; but no one has

suggested that there is any confidentiality whatsoever about the job of general registrar or assistant registrar.

The case of Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236 (1st Cir. 1986), involved eleven regional directors for the Urban Renewal and Housing Corporation of Puerto Rico. The evidence presented in that case included a link between public housing and political philosophies, such that an ideological conflict would hinder an administration's housing program. Based on this evidence, the court found that these positions related to partisan interests or concerns and vacated a preliminary injunction. Id. at 243. In the present case, there is no evidence of a connection between registering voters and political philosophy. Thus, the Jimenez Fuentes case furnishes no reason for supposing that the First Circuit would have decided the present cases differently than the Fourth.

The final case cited by the Commonwealth

is Brown v. Trench, 787 F.2d 167 (3rd Cir. 1986). Again, there is absolutely no similarity between the job involved in that case and the jobs involved in these cases. The Brown case involved an assistant director of public information who served essentially as a press secretary, speech writer and legislative liaison for elected county commissioners. Id. at 170. A post whose principal duty is to communicate the views of elected public officials is one in which partisan affiliation may be an appropriate criterion, but there is no evidence to show that the general registrar or assistant registrar performs any such function. Thus, there is no reason to suppose that the Third Circuit would have decided the present cases any differently than the Fourth.

In sum, the Commonwealth has failed to show any conflict whatsoever between the Fourth Circuit and any other circuit. Thus, the Writ of Certiorari should be denied on this issue.

II.

LOCAL ELECTION OFFICIALS ARE EMPLOYEES OF BOTH STATE AND LOCAL GOVERNMENTS, AND THIS ISSUE SHOULD BE DECIDED BY THIS COURT.

The Respondents Kilgore, McConnell and Burchett maintain, for the reasons set forth in their Cross-Petition for a Writ of Certiorari, that local election officials are employees of both state and local governments. The Fourth Circuit's decision that electoral boards and general registrars are state employees has drastically affected these respondents because the Fourth Circuit then granted the Commonwealth eleventh amendment immunity. The Fourth Circuit did not actually decide whether the assistant registrar is a state or local position but only found "that Cheek was acting as a state officer when he failed to rehire Burchett as assistant registrar." McConnell, 829 F.2d at 1328. In making this decision, the Fourth Circuit failed to address the fact that the assistant registrar is more directly controlled by the local government.

Furthermore, the Fourth Circuit's decision conflicts with the later amendment of Va. Code § 24.1-32 by the General Assembly of Virginia. This amendment states that registrars and electoral boards shall be deemed for all purposes employees of the localities.

Respondents prefer that this Court review and decide this issue. However, if this Court does not grant a Writ of Certiorari on this question as presented in respondents' Cross-Petition, Kilgore, McConnell and Burchett submit that, since this issue is of vital importance, it should then be certified to the Supreme Court of Virginia.

CONCLUSION

For the foregoing reasons, Respondents Kilgore, McConnell and Burchett respectfully pray that the Petition for a Writ of Certiorari, filed by the Commonwealth of Virginia on the question of the political firings, be denied; and that the issue of the state/local employment status either be reviewed by this Court or be certified to the Supreme Court of Virginia.

Respectfully submitted,

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APPENDIX

VA. CODE § 24.1-18 APPOINTMENT; TERM; SECRETARY; SEAL AND OFFICE - There shall be a permanent board which shall be known as the State Board of Elections to consist of three members, appointed by the Governor from the qualified voters of the Commonwealth subject to confirmation by the General Assembly. In the appointment of the Board, representation shall be given to each of the political parties having the highest and next highest number of votes in the Commonwealth for Governor at the last preceding gubernatorial election. A majority of the Board of Elections shall be from the political party which cast the highest number of votes in the Commonwealth for Governor at the last preceding gubernatorial election. When the Governor was not elected as the candidate of a political party, representation shall be given to each of the political parties having the highest and next highest number of members of the General Assembly at the time of the appointment and a majority of the

Board shall be of the political party having the highest number of members in the General Assembly. The political party entitled to an appointment may make and file recommendations with the Governor for the appointment. Such recommendations shall contain the names of at least three qualified voters of the Commonwealth. The regular terms of office of such members shall be four years, commencing February first after their appointment. Vacancies shall be filled for the unexpired terms. No member of the Board, except the secretary, shall be eligible for more than two successive terms. The Governor shall designate one member of the Board as the secretary, who shall receive such salary as is fixed by law. The Board shall adopt a seal for its use, and bylaws for its own government and procedure. The Board shall be provided with necessary office space and equipment. The secretary may employ such clerical, other assistants and personnel as may be required to carry out the duties

imposed by this title. The provision of § 2.1-41.2 shall not apply to this chapter. (Code 1950 §§ 24-24, 24-345.10; 1952, c. 509; 1956, c 392; 1970, c. 462; 1973, c. 30; 1975, c. 515; 1977, c 576; 1980, c. 728; 1984, c. 444.)

VA. CODE § 24.1-107 COMPENSATION OF OFFICERS - The officers of any election shall receive as compensation for their services the sum of thirty dollars for each day's service rendered on each election day. The governing body of any county, city or town may increase the compensation herein prescribed for officers of election.

The chief officers of election, or if unable, the assistant, shall pick up and carry to the polling place the pollbooks and ballots if so directed by the electoral board and an officer of election shall carry the returns of the election and ballots as provided in § 24.1-143 from the polling place. Such chief officer, assistant or officer of election shall receive for each such service the sum of ten dollars, and mileage as paid to the members of the General Assembly. (Code 1950, §§ 24-207 through 24-209; 1950, p. 245; 1956, c. 235; 1968, c. 141; 1970, c. 462; 1972, c. 620; 1974, c. 428).